

--Defending Against Superfund Liability--
Guidelines for Property Owners Affected by Mine Waste
Within the Bunker Hill Superfund Site

This document is intended to help property owners understand what they must do in order to assert a defense against Superfund liability for mining-related waste on properties within the Bunker Hill Superfund Site. This document explains:

- all appropriate inquiries,
- reasonable steps,
- continuing obligations,
- how the Institutional Controls Program (ICP) fits in, and
- who to contact for more information.

In 2002, changes were made to CERCLA, the Superfund law. For those who acquire property *after* January 11, 2002, these changes may provide liability protection to landowners who are not responsible for contamination and not affiliated with someone who is potentially liable for the contamination. A defense against CERCLA liability may protect a landowner from a legal action to recover cleanup costs related to the property.

To claim this defense, property owners must, among other things, meet certain requirements. Those requirements include performing all appropriate inquiry, taking reasonable steps, and satisfying certain continuing obligations.

Acquisition date must be after January 11, 2002.

All appropriate inquiry (or AAI) requires prospective purchasers to assess property conditions and research historical uses of the property before acquisition.

Taking reasonable steps refers to actions an owner must take to address the contamination on-site.

Satisfying continuing obligations means complying with certain requirements after acquiring the property in order to maintain the defense to liability.

All Appropriate Inquiries: Defenses to CERCLA liability include (a) innocent landowners, (b) bona fide prospective purchasers, and (c) contiguous property owners. To qualify for one of these defenses, one must have made “all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices.” These inquiries must happen within one year *before* acquiring the property. Details on the 2006 AAI rule are at www.epa.gov/brownfields/regneg.htm.

Residential Property: Prior to purchase of property by a non-governmental or non-commercial entity for residential use, a facility inspection and title search would meet the requirements of AAI. A home inspection would likely meet the “facility inspection”

standard. EPA also expects a purchaser of residential or commercial property within the Box and Basin to check Institutional Controls Program (ICP) property records before acquisition, and to comply with all ICP requirements after acquisition.

Commercial Property: For commercial property and/or governmental acquisition, AAI requires that, at a minimum, an ASTM Phase 1 Site Assessment be done within a year before acquisition. An ASTM Phase I Assessment is a specific set of inquiries into past property usage and current conditions set by the American Society for Testing and Materials (ASTM). The assessment should include review of ICP property records before purchase. The purpose of these activities is to make the purchaser aware of the property's condition related to mine waste and other hazardous substances.

Reasonable Steps: After acquiring the property, the owner must exercise appropriate care with respect to the contamination on-site. The owner must take reasonable steps to stop any continuing release, prevent any future release, and prevent or limit human, environmental or natural resource exposure to any previous release.

Continuing Obligations: Compliance with the ICP is an important "continuing obligation" for all property owners in the Box and, once in place, in the Basin. Property owners interested in asserting a defense to CERCLA liability must, among other things:

- comply with the ICP;
- cooperate with EPA and State cleanup efforts;
- give EPA and the State access to the property for response actions and monitoring the effectiveness of those actions; and
- not contribute to the mine waste contamination within the Box or Basin.

Importance of the Institutional Controls Program (ICP): The ICP is a key tool for property owners in the Box and Basin. ICP property records are a source of information for the required pre-purchase inquiries. The ICP also helps property owners by clearly stating how to meet continuing obligations related to mine waste. After purchase, compliance with the ICP helps the property owner establish that he/she has taken reasonable steps to manage any mine waste contamination on the property.

Questions

For questions about defenses to Superfund liability at the Bunker Hill site, contact:
Anne McCauley, U.S. EPA Region 10, (206) 553-4689 or 1-800-424-4372

For questions about the ICP, contact:
Jerry Cobb, Panhandle Health District, (208) 783-0707
<http://www2.state.id.us/phd1/icp.html>

More information: www.epa.gov/compliance/resources/cleanup.html
www.epa.gov/brownfields/regneg.htm.

NOTE: This information sheet was created solely as a guide and is not intended, nor can be relied upon, to create any rights enforceable by any party in litigation with the United States.